No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

APPELLANT'S OPENING BRIEF

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A. STATEMENT REGARDING JURISDICTION

Appellant, The De La Rama Steamship Co., Inc., takes this appeal from a judgment of the United States District Court for the Northern District of California awarding judgment to the appellee, H. H. Pierson, in the sum of $9,650.

The appellee filed suit in the Superior Court of the State of California in and for the City and County of San Francisco on December 18, 1946, seeking additional compensation for services rendered to appellant during the war period, December 7, 1941 to August 14, 1945 (Tr. 2-6).[1] That action was one at law

1. References to the Transcript of Record on Appeal are indicated as follows: "(Tr. ....)".
Emphasis, throughout this brief, is ours unless otherwise indicated.

a civil nature and the amount in controversy exceeded the sum of $3,000, exclusive of interest and costs. Appellee, plaintiff below, was a resident and citizen of the State of California. Appellant, defendant below, was a corporation organized and existing under the laws of the Republic of the Philippines. The District Court would have had original jurisdiction of such an action (28 U.S.C. Sec. 41) and it was within the removal statute (28 U.S.C. Sec. 71). Accordingly, appellant filed a petition for removal to the United States District Court on December 31, 1946 (Tr. 6-9), and an order granting the petition was made and filed January 2, 1947 (Tr. 9-10). Pleadings showing the jurisdiction of the District Court are set forth in the petition for removal (Tr. 6-9).

Thereafter, the case came on for a non-jury trial and on December 18, 1947, the Trial Judge made an order for judgment for appellant on the ground that there was no evidence of contractual liability (Tr. 16-17). On February 6, 1948, the Trial Judge made and filed Findings of Fact and Conclusions of Law (Tr. 17-21) and on February 13, 1948, entered judgment for appellant (Tr. 22-23).

On February 20, 1948, appellee moved that the court grant a new trial or vacate the findings and judgment and enter judgment in favor of appellee (Tr. 23-24). On June 9, 1948, the Trial Judge set aside the judgment theretofore entered in favor of appellant and directed entry of a new judgment in favor of appellee (Tr. 24-25). Pursuant to that order, new Findings of Fact and Conclusions of Law were made on June 21, 1948 (Tr. 25-32), and on June 28, 1948 judgment was entered for appellee in the sum of $9,650 and costs in the amount of $26.90 (Tr. 33-34).

On July 8, 1948 within thirty days after entry of judgment for the appellee, appellant filed a notice of appeal (Tr. 34-35).

This Court has jurisdiction of the appeal. 28 U.S.C., Sec. 225 (a) and (d). Appellant filed a designation of the contents of the Record on Appeal on July 9, 1948 (Tr. 36-37), which was amended by an order pursuant to stipulation on September 16, 1948 (Tr. 37-38). By order of the District Court the time within which the Record on Appeal must be filed was extended to September 30, 1948 (Tr. 35-36).

On September 28, 1948, the Transcript of Record on Appeal was certified by the Clerk of the District Court (Tr. 38-39) and filed on the same day with the Clerk of this Court (Tr. 221). On September 28, 1948, appellant filed a statement of points to be relied upon in this appeal (Tr. 222-226) and on the same day a stipulation was filed designating the portion of the record to be included in the printed Record on Appeal (Tr. 227).

B. STATEMENT OF THE CASE

This case involves the existence, terms and validity of a contract of employment found by the Trial Court to have resulted from certain conversations in February 1944, between appellee and Mr. Suewer, the United States Manager for appellant. In that month Mr. Suewar stated (in substance) to appellee, who was employed as appellant's Pacific Coast Manager, that after the war he would recommend to appellant's Board of Directors that bonuses be paid to the key men, including appellee. From that conversation the Trial Court deduced the existence of a new contract of employment whereby appellee was hired from that date to the termination of the war,[2] and in which the agreed compensation was to be the reasonable value of appellee's services, *not from the date of the new hiring, but from December 7, 1941* to the termination of the war. The Trial Court found

2. Plaintiff alleged (Tr. 5) and defendant admittted (Tr. 13) that actual combat warfare ceased August 14, 1945; hence, for the purposes of this case, that date is to be taken as the end of the war.

that the reasonable value of appellee's services during this period was $44,250, which was $9,650 in excess of the amount paid. The Trial Court also found as a "fact" that the Stabilization Act of 1942 (50 U.S.C. App. Sec. 961 et seq.), and the regulations issued thereunder, did not prohibit enforcement of this contract.

It is apparent from the foregoing that this appeal turns upon the validity of certain findings of the Trial Court. We think that some of these findings are not properly designated "Findings of Fact"—that they are conclusions of law, or at most, findings of "ultimate fact."

As a background to the conversation of February 1944, we set forth the relationship of the parties and outline what was said and done about compensation.

Prior to the war, appellant, a Philippine corporation, operated a shipping line from the Philippines and other Oriental ports to the Atlantic and Pacific Coasts. In February 1939 appellee, together with a Mr. Bradford, organized a corporation called The De La Rama Steamship Agencies, which acted as the California agency for appellant's shipping business. On June 30, 1940 appellant bought out the agency and, commencing on July 1, 1940, employed appellee as its Pacific Coast Manager at a salary of $600 per month (Tr. 51-52, 203-204). It was more than he had been earning previously (Tr. 205). Appellee remained in that position at varying rates of pay throughout his employment, which terminated August 31, 1946 (Tr. 162).

To service its shipping business in the United States after July 1, 1940, appellant maintained an organization in this country headed by Mr. Robert F. Suewer, who then held the title of United States Manager. The organization under Mr. Suewer included a New York office in charge of Mr. Griffin. On the West Coast there were offices at Los Angeles (including a "dock office" at Long Beach) and San Francisco, both in charge of appellee. In March 1941, Mr. Bradford was sent from

appellant's home office at Manila and became Assistant United States Manager under Mr. Suewer. Mr. Bradford took charge of the Pacific Coast business, and until he went into the Army Transport Service in February 1942, appellee, although retaining the title of Pacific Coast Manager, acted under his immediate supervision. Thereafter Mr. Griffin, head of the New York office, became second in command of the United States organization, and appellee was subject to his directions as well as those of Mr. Suewer (Tr. 123-125).

The nature of appellee's duties and functions prior to the war is not shown by the Record in any great detail. It appears, however, that they were of the sort typical of a steamship agent and concerned with looking after ships in port and booking cargoes.

Shortly after the outbreak of war in December 1941, communications with appellant's home office in Manila were cut off. From that time until communications were restored in the latter part of 1945, Mr. Suewer managed appellant's United States organization under a wartime power of attorney (Tr. 128), which was released to him by the Philippine National Bank of New York (Tr. 160).

This court has judicial knowledge that the war completely disrupted commercial shipping in the Trans-Pacific service where appellant operated. Appellant's three ocean going vessels were requisitioned by the Maritime Commission (Tr. 164) and a decided lull in activity followed while Mr. Suewer sought a new field of operation to hold the organization together (Tr. 41, 164-165). During 1942 nobody was discharged, but on the other hand, no effort was made to retain the services of any who wanted to leave (Tr. 165). As a foreign corporation, appellant was not at first eligible for a Maritime Commission general agency, but in the latter part of 1942, Mr. Suewer succeeded in getting an agency contract from the War Shipping Administration (Tr. 58, 164). The first vessels were received, pursuant

to the agency agreement, early in 1943, and from that time until the end of the war appellant's United States organization operated almost exclusively for the War Shipping Administration (Tr. 164-165).

Under the agency contract the pace of appellant's activity, like that of all shipping companies, increased substantially over prewar levels (Tr. 76). Appellee's duties and responsibilities during this period were somewhat different in kind, but greater in amount (Tr. 64-65). The number of employees under his jurisdiction increased from a prewar level of 12-15 to a wartime peak of 30-35 (Tr. 61).

The first discussion of appellee's salary came early in 1943. Up to that time appellee had been earning $600 per month in accordance with the terms of his initial employment on July 1, 1940. In addition, he had received a Christmas bonus each year in the amount of one month's salary. Similar bonuses were paid throughout appellee's employment (Tr. 52-53).

Early in 1943, appellee approached Mr. Suewer, who was then in San Francisco, and asked for an increase in his own salary and that of other employees under his supervision. Mr. Suewer agreed to an increase for all concerned, including an increase for appellee from $600 to $708.33 per month, and authorized appellee to apply to the Salary Stabilization Unit for approval (Tr. 207, 179, 180). Appellee filed an application with the Salary Stabilization Unit of the Treasury Department (Tr. 66) on April 8, 1943. The application was rejected by the Regional Office (Tr. 110) and appellee appealed the decision, giving further reasons to justify the increase (Tr. 110-118). The application was granted in October 1943, and was effective as of the date of application on April 8, 1943 (Tr. 79).

There was no further discussion of salary until February 1944 (Tr. 208). In that month, Mr. Suewer was again in San Francisco and the conversations with which this case is particularly concerned took place there. There were no witnesses

and no memoranda were made by either party (Tr. 168, 217). The testimony of appellee and Mr. Suewer is in conflict about some details of that conversation. The Trial Court in amended Finding of Fact No. 4 found that

> "During the month of February, 1944, plaintiff and said Suewer engaged in conversations in the course of which the said Suewer represented, stated and promised to plaintiff * * * (L.E.G.—D.J.) that at the conclusion of the war the said Suewer would recommend to the Board of Directors that such additional sum of money or bonus be paid to plaintiff by defendant, which together with the salary and bonuses received by plaintiff during the war would equal the reasonable value of the services performed by plaintiff for defendant during the period of warfare." (Tr. 28)

We challenge that finding insofar as it includes a finding that the amount of the bonus to be recommended would be based upon the reasonable value of appellee's services.

The Trial Court originally concluded, on a substantially identical finding (Tr. 18), that no contract had been made. After motion for a new trial the judge changed his mind and, on the same evidentiary facts, concluded that a contract had been made (Tr. 24-25) and proceeded to detail its terms in what purport to be findings of fact (Tr. 29).

We contend that, even assuming the evidentiary finding to be correct, no contract was created and certainly not the contract which the Trial Court found.

No approval was sought or obtained from the Salary Stabilization Unit of the Treasury Department. The Trial Court purported to find as a "fact" that none was required and that the Stabilization Act of 1942 (50 U.S.C. App. Secs. 961 et seq.) and the regulations issued thereunder did not prohibit enforcement of the contract (Finding No. 11; Tr. 31).

We contend that this finding, which is purely a matter of law involving the interpretation of the statute, is erroneous.

Early in 1945, Mr. Suewer again approved a raise in pay for appellee; this time from $708.33 to $750 per month. Appellee again handled the application to the Salary Stabilization Unit (Tr. 75, 80). That application was granted effective March 16, 1945. There was no further change in appellee's rate of compensation during his employment. Thus he received $600 per month from the commencement of his employment (on July 1, 1940) to April 8, 1943; $708.33 to March 16, 1945; and $750 thereafter until the termination of his employment on August 31, 1946. In addition, appellee received a Christmas bonus each year in the amount of one month's salary. In addition he received $2,500 in July 1946, as the bonus paid in response to the recommendation of Mr. Suewer made in accordance with the conversation in February 1944.

After communications to the Philippines were restored, Mr. Suewer returned to the home office in Manila, in February 1946, to report to the directors. While there, he recommended to the directors that some of the key men in the United States organization should be paid an additional bonus. The Board requested Mr. Suewer to recommend the names of the persons who should receive such bonuses and the respective amounts. Upon his return to the United States, Mr. Suewer recommended bonuses for several key employees, including appellee. Appellant's Board of Directors approved these recommendations and appellee received payment of $2,500 in July 1946 (Tr. 172, 189-192).

With respect to the bonus paid to appellee, Mr. Suewer testified that it was arrived at on the assumption that an additional bonus of approximately $500 a year during the war period would be appropriate in his case and finally came to a round figure of $2,500 (Tr. 173, 194). Mr. Suewer also testified that

the amount of his recommendation was based solely upon his judgment of the merit of the individual employee (Tr. 196-197).

On December 18, 1946, appellee brought this action, setting forth in his complaint two causes of action. First, that Mr. Suewer had promised appellee that appellant would, within a reasonable time after termination of warfare, pay appellee a bonus which, together with the salary received by him from December 7, 1941 to the termination of actual warfare, would equal the salary paid to other persons holding comparable positions and performing comparable duties in similar steamship companies. Appellee further alleged that the amount being paid for comparable work during the period from December 7, 1941 to August 14, 1945, was $1,000 a month and demanded the difference between what he actually received and what he would have received at the rate of $1,000 a month.

In the second cause of action, appellee alleged that by reason of the matters alleged in the first cause of action, appellant became indebted to appellee for the reasonable value of appellee's services during the period from December 7, 1941 to August 14, 1945.

At the trial of this action, there was a conflict in the testimony about appellee's efficiency (Tr. 163-164, 195, 93, 104). The Trial Court made no finding of fact with respect to this matter.

Appellee sought to prove the rate of compensation paid during the war period by other steamship companies for comparable positions (Tr. 96-99, 107). The evidence offered was rejected by the Trial Court (Tr. 98-99, 107) but subsequently motions were made to reconsider these rulings (Tr. 141). The Trial Court took them under advisement (Tr. 142) but, apparently, never decided them. The Trial Court made no finding about comparable salaries.

Appellee also sought to prove the reasonable value of his services. Here, too, there is uncertainty about what testimony was stricken (Tr. 95, 141-142) and the testimony was conflicting. The Trial Court found that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 was $44,250 (Tr. 30). This sum was a computation based upon $1,000 per month (Tr. 20, 140).

We challenge this finding particularly as applied to the period prior to early 1943 when appellant's business activity was at a low ebb.

After the trial of this action the Trial Court ordered judgment for appellant, stating that there was no evidence of contractual liability (Tr. 16-17). It is significant that the *evidentiary facts* originally found—what was said in the conversation of February 1944—were substantially identical with those found in the Amended Findings of Fact (Tr. 18 and 28). The Trial Court originally concluded that the evidentiary facts did not establish a contract (Tr. 21) and gave judgment for appellant (Tr. 22). After motion for a new trial, the Trial Court reached a different conclusion based on the same facts. That this was merely a change in the conclusion of law, rather than the fact, is indicated by the text of the order vacating the judgment where the court said:

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services. § 1611 California Civil Code.
>
> "A finding to this effect should be included in the findings of fact." (Tr. 25).

Thereafter the Trial Judge purported to find as a "fact" that the conversation resulted in a contract (Finding No. 5; Tr. 29).

C. SPECIFICATIONS OF ERROR[3]

Appellant contends:

1. The District Court erred in finding that Mr. Suewer's statements to appellee about the bonus which he would recommend to the Board of Directors included the representation that the amount of the bonus would be based upon the reasonable value of the services performed by appellee during the period of warfare (Finding No. 4; Tr. 28-29).

2. The District Court erred in making what purports to be a "finding of fact" that the conversation found in Finding No. 4 to have occurred, resulted in a contract of hiring from February 1944 to August 14, 1945 at the reasonable value of appellee's services from December 7, 1941 to August 14, 1945 (Finding No. 5; Tr. 29).

3. The District Court erred in finding that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 was $44,250 (Finding No. 7; Tr. 29-30).

4. The District Court erred in making what purports to be a "finding of fact" that pursuant to the terms of the contract found to exist, the additional compensation was payable only after and upon the termination of wage and salary controls (Finding No. 11; Tr. 31).

5. The District Court erred in making what purports to be a "finding of fact" that the payment of the additional compensation found to be due and payable under the contract

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3. For convenience we have summarized the technical Statement of Points Upon Which Appellants Intend to Rely on Appeal in the generalized specifications of error set forth in this section. The Statement of Points to Be Relied Upon are correlated with the Specifications as follows: Specification 1 above includes Point 3; Specification 2 includes Points 4 and 5; Specification 3 includes Points 6, 7 and 8; Specification 4 includes part of Point 10; Specification 5 includes Points 9, 10 and 17; Specification 6 includes Points 11, 12, 13, 14, 15, 16 and 18.

Appellant abandons Points 1 and 2 relating to the authority of Mr. Suewer.

found was not prohibited by the Stabilization Act of 1942 (50 U.S.C., App. 961 et seq.) and the regulations promulgated thereunder (Finding No. 11; Tr. 31).

6. The District Court erred in concluding that the judgment theretofore entered for appellant should be set aside and judgment should be entered for appellee (Conclusion Nos. 2 and 3; Tr. 32).

I. PRELIMINARY ANALYSIS

A. Appellant's Contentions.

As an introduction to the discussion which follows, we summarize here appellant's position on this appeal.

1. In the course of the conversation of February 1944 between appellee and Mr. Suewer, Mr. Suewer did promise to recommend a bonus for the key men including appellee, but it is not true that he stated that his recommendation would be based on salaries paid by other steamship companies for comparable positions (as testified by appellee), nor did he state that the basis would be the reasonable value of appellee's services during the war-time period (as found by the Trial Court in Finding No. 4).

If this Court agrees with our contention that Finding No. 4 is "clearly erroneous," the judgment must be reversed on that ground alone, since the critical findings and conclusions stem from this finding of what was said in the conversation of February 1944. The remaining points argued in this brief are directed to the contention that if Finding No. 4 is sustained, it does not support the conclusions drawn from it.

2. The conversation found in Finding No. 4 does not support the conclusion, erroneously expressed as "Finding of Fact" No. 5, that a contract of employment was thereby entered into, particularly in view of the uncontradicted testimony that both Mr. Suewer and appellee acted upon the assumption that Mr. Suewer had no authority to make such a contract for appellant.

We contend that the Trial Court's purported "Finding of Fact" is no more than a conclusion drawn from the evidentiary facts upon which this Court may substitute its judgment as freely as the Trial Court itself did when it vacated the judgment for appellant and substituted one for appellee.

3. If there was a contract of hiring at the reasonable value of appellee's services in February 1944 from that date to the end of the war (as found by the Trial Court in Finding No. 5), there is no basis for the Trial Court's finding that the compensation for such hiring was to be the reasonable value of appellee's services, not from the date of hiring, but from December 7, 1941, to the end of the war.

4. If there was a contract to pay appellee an additional sum based on the reasonable value of his services from December 7, 1941 to August 14, 1945 (as found by the Trial Court in Finding No. 5), still the Trial Court's Finding No. 7 that the reasonable value amounted to $44,250 is "clearly erroneous." That finding of a lump sum was a computation based upon an assumed rate of $1,000 per month. The finding is against the clear weight of the evidence as applied to the period prior to early 1943 when the uncontradicted testimony showed a decided lull in appellant's operations.

5. The contract found by the Trial Court was illegal and void as a violation of the Stabilization Act of 1942 (50 U.S.C., App. Sec. 961 et seq.) and the Regulations issued thereunder. The Trial Court's Finding No. 11 that there was no violation obviously is a conclusion of law and not a finding of fact.

B. Summary Statement of the Principles Applicable to Appellate Review of Findings in a Non-Jury Case.

This appeal turns on the validity of certain findings of the Trial Court. Some of those findings we believe are mislabelled —they are conclusions of law which gain no sanctity from the

erroneous label. But some of the findings challenged on this appeal are properly classified as findings of fact. We state here the general principles of law governing appellate review of such findings.

1. THE SCOPE OF APPELLATE REVIEW IS IN ACCORD WITH THE FEDERAL EQUITY PRACTICE.

Rule 52(a) *Federal Rules of Civil Procedure* governs appellate review of the trial court's findings of fact in a non-jury case. It provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

That rule was intended to and did make the then prevailing federal equity practice applicable to the review of all facts tried without a jury.[4] Such a review is of law and fact, and the finding of fact is reviewable as to the weight as well as the sufficiency of the supporting evidence. 3 *Moore's Federal Practice,* p. 3118. The appellate review is no longer limited to the question of whether there is evidence to support the finding. *Simkins' Federal Practice* (3rd ed.) p. 488.[5]

The Supreme Court stated the principle in definitive form in the recent case of *United States v. United States Gypsum Co.,* 333 U.S. 364, 92 L.ed. (Adv. Op.) 552, 68 S.Ct. 525. The court there reversed numerous findings of the trial court and

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4. The notes of the Advisory Committee expressly state the intent and it has been given effect in the cases. *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-5, 92 L.ed. (Adv. Op.) 552, 68 S.Ct. 525; *Equitable Life Assurance Society v. Irelan* (9 Cir. 1941) 123 F.2d 462, 464.

5. See also *State Farm Mutual Automobile Insurance Co. v. Bonacci* (8 Cir. 1940) 111 F.2d 412, 415; *Fleming v. Palmer* (1 Cir. 1941) 123 F.2d 749, 751; *Aetna Life Insurance Co. v. Kepler* (8 Cir. 1941) 116 F.2d 1, 4-5.

after observing that Rule 52(a) made applicable the equity practice said (p. 395):

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The quoted language is in accord with the earlier authorities and has since been adopted and applied by this Court.[6]

2. WHERE THE EVIDENCE CONSISTS OF DEPOSITIONS, DOCUMENTS OR UNDISPUTED MATTERS, THE TRIAL COURT'S FINDING IS ENTITLED TO ONLY SLIGHT WEIGHT.

Not every finding of the trial court is entitled to equal weight. The reason for the rule attaching weight to the finding is the superior opportunity of the trial court to judge the credibility of the witnesses. To the extent that the finding rests upon documentary evidence, depositions or undisputed circumstances, the appellate court is in as good a position to weigh the evidence as the trial court. Accordingly, only slight weight is attached to the trial court's findings on such matters. *Equitable Life Assurance Society v. Irelan* (9 Cir. 1941) 123 F.2d 462, 464; *Himmel Bros. Co. v. Serrick Corp.* (7 Cir. 1941) 122 F.2d 740, 742; *Fleming v. Palmer* (1 Cir. 1941) 123 F.2d 749, 751; *Western Union Telegraph Co. v. Bromberg* (9 Cir. 1944) 143 F.2d 288; *State Farm Mutual Automobile Insurance Co. v. Bonacci* (8 Cir. 1940) 111 F.2d 412, 415.

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6. *Home Indemnity Co. v. Standard Accident Insurance Co.* (9 Cir. 1948) 167 F.2d 919, 923; *National Motor Bearing Co. Inc. v. Chanslor & Lyon Co.* (9 Cir. 1948) 167 F.2d 1001.

3. FINDINGS WHICH ARE CONCLUSIONS OR INFERENCES DRAWN FROM THE EVIDENTIARY FACTS ARE ENTITLED TO ONLY SLIGHT WEIGHT.

It is also true that many findings of ultimate fact consist of the inferences and conclusions drawn by the trial court from the evidentiary facts. Here again the appellate court is in as good a position to draw the inference as the trial court and accordingly such findings are entitled to only slight weight. The appellate court remains free to draw the ultimate inferences and conclusions which in its judgment the findings of evidentiary fact reasonably induce. *Kuhn v. Princess Lida of Thurn & Taxis* (3 Cir. 1941) 119 F.2d 704, 705-6; *Western Union Telegraph Co. v. Bromberg,* supra; *Home Indemnity Co. v. Standard Accident Insurance Co.* (9 Cir. 1948) 167 F.2d 919, 923; *United States v. Anderson* (7 Cir. 1939) 108 F.2d 475, 478-479; *Himmel Bros. Co. v. Serrick Corp.,* supra; *United States v. Armature Rewinding Co.* (8 Cir. 1942) 124 F.2d 589, 591; *Murray v. Noblesville Milling Co.* (7 Cir. 1942) 131 F.2d 470, 475.

II. THE CONVERSATION OF FEBRUARY 1944

Mr. Suewer's statements to appellee in February 1944 are the foundation for this action. We contend that he did no more than to inform appellee that when he could again communicate with the directors of the company he intended to recommend that some additional sum be paid to key employees as a reward for faithful service during the war. Mr. Suewer's testimony supports that contention. Appellee's testimony, at least in some respects, is in conflict. We contend that the conflict should have been resolved in favor of Mr. Suewer's version. But we also contend that even if appellee's testimony is accepted at face value, it does not support the finding that Mr. Suewer stated that his recommendation would be *based upon the reasonable value of appellee's services.*

There were no witnesses to the conversation, and neither appellee nor Mr. Suewer made any memoranda (Tr. 168, 217).

Mr. Suewer's testimony was put into evidence by deposition (Tr. 120). Appellee's deposition was taken and placed in evidence (Tr. 154). Appellee also testified at the trial but Mr. Suewer did not. As we shall show, appellee's testimony at the trial was more favorable to him than his testimony on deposition.

Mr. Suewer testified that he discussed the matter of bonuses with his assistant, Mr. Griffin, and with appellee (Tr. 184-185). Concerning the conversation with appellee, he testified that he told appellee that when the war was over and he could again communicate with Manila, he intended to ask the directors to give some of the key men, including appellee, an additional bonus beyond the usual Christmas bonus (Tr. 166).

Mr. Suewer recalled that on several occasions appellee had stated that the company's salary scale was below that prevailing in other steamship companies[7] and that some of the key men might leave (Tr. 182). Mr. Suewer was explicit in his testimony that his statements about a bonus were not made in the course of any such discussion (Tr. 182), but rather that they were made voluntarily (Tr. 167). He was emphatic in his testimony that appellee had never threatened to resign unless a pay increase was given and that he had never interpreted appellee's remarks about "key men" leaving as a veiled threat that appellee himself would resign (Tr. 182). Mr. Suewer also testified that the identity of the key men for whom he would recommend a bonus was not discussed beyond the specific inclusion of appellee (Tr. 183); that there was no discussion of the amount or basis upon which the recommendation would be made (Tr. 196-197); that he himself had never contemplated that the recommendation would be based on salaries paid by other companies (Tr. 196-

7. In this connection, it should be noted that appellee himself recognized that appellant, being a smaller company, could not meet the salaries being paid by larger steamship companies. See appellee's letter to the Treasury Department dated August 10, 1943, wherein appellee sought approval of the 1943 pay increase (Tr. 117).

197). He also testified that he had informed appellee that he had no authority to take such action without the approval of the Board of Directors, but that he believed that the Board would follow his recommendation (Tr. 183).

With respect to appellee's version of the conversation, we turn first to the allegations in his verified complaint. He alleged that in February 1944 Mr. Suewer, in response to appellee's complaints about an inadequate salary and threat to resign, had replied that if appellee would remain appellant would, within a reasonable time after termination of actual warfare, pay appellee an additional sum *equal to the difference between what appellee was paid from December 7, 1941 to the termination of actual warfare and what other persons holding comparable positions in similar steamship companies were paid* (Tr. 3-4).

In his deposition, appellee's version of the conversation differed from Mr. Suewer's principally in that appellee placed Mr. Suewer's statements about a bonus in the context of a discussion of salaries in general and particularly of the higher salaries being paid by other steamship companies (Tr. 209). Appellee testified that Mr. Suewer had agreed that the company's salaries were below other steamship companies and that something should be done about it when they could again communicate with Manila. He also testified that in that discussion he told Mr. Suewer that some of the higher ups, including himself, would leave unless something was done about higher salaries (Tr. 217) and that Mr. Suewer had said that he did not have authority to grant any bonus but that it would be taken up with the home office when communications were restored (Tr. 209-210).

It will be observed that appellee's testimony on deposition about the amount of the bonus and what Mr. Suewer had said is substantially the same as Mr. Suewer's testimony, the only appreciable difference lying in the context in which the statements were made. Appellee stated that the conversation ended

with the understanding that Mr. Suewer would take the matter up with the home office when communications were restored. With respect to the amount of the bonus, appellee testified in his deposition:

> "Q. What discussion was had at that time as to the amount of the bonus?
>
> A. There was no actual amount mentioned on it other than what would be considered a fair bonus for the top men that had carried on through the war period at a low salary. There was no actual amount stipulated to.
>
> Q. So he therefore agreed at that time to take the matter up with the people in Manila after Manila was liberated?
>
> A. That's right. Well, he felt or he asserted that he knew that if he recommended certain increases or bonuses for the boys at work during the war period, he felt positive they would be granted.
>
> Q. But there was no fixing of any amount?
>
> A. No stipulation as to the amount at all and we trusted the boy." (Tr. 210)

At the trial, appellee's recollection was more detailed and, on the whole, more favorable to himself. Again he recalled that on several occasions he had pointed out to Mr. Suewer that the company's salary scale was below that of other steamship companies and that the key men would resign unless something was done about it. At least one of these conversations appears to have been in connection with the 1943 pay increases (Tr. 66-67). As to whether appellee himself had threatened to resign, appellee again reaffirmed that he had, but again it is not clear whether the threat was explicit or whether it was implied in appellee's understanding that he was one of the "key men" to whom he referred (Tr. 67). He testified that Mr. Suewer's remarks about a bonus were made in response to such assertions (Tr. 67). And this time, it may be noted, appellee testified that he himself did not consider that it would really

be a bonus. "It was more on the basis of working out something to make up the difference of a comparable salary paid by other corporations at the time during the war * * *" (Tr. 68).

With respect to just what Mr. Suewer had said he would recommend to the directors, appellee testified on direct examination:

> "Q. No, you said he was going to recommend. Will you tell the court the substance of what Mr. Suewer told you?
>
> A. He told me that he thought a comparable salary—I mean a bonus worked out on a basis of a comparable salary—in other words, if somebody was getting $1000 a month and I was getting $600 a month, he figured we should get $400 a month during the war period to make up the difference.
>
> Q. You mean an employee or someone outside of your company?
>
> A. That is right.
>
> Q. What did he say he would do with respect to having such an additional compensation paid you? What did he say he would do about it?
>
> A. He said he would make the representation and felt sure his recommendation would go—in fact, he expressed himself that he would insist upon them paying it." (Tr. 68-69)

On cross-examination, with the aid of some questions by the court, appellee definitely linked the amount of the promised recommendation to the basis of comparable salaries being paid by other steamship companies:

> "Q. In your discussion with Mr. Suewer you did not get down at any time to a discussion of amount, did you?
>
> A. Any actual amount?
>
> Q. Yes.
>
> A. No.
>
> Q. There was never any mention of it, was there?
>
> A. Not as to whether it would be $5,000, $2,000, no.

It was always based upon what would be fair compensation for the work we were doing under the circumstances we were working.

Q. That last statement that you just made was not a part of any discussion you had with Mr. Suewer; that was just your own impression, isn't it?

A. No, no. The thing was discussed with him on the basis of what we would shoot at. No actual amount was stipulated.

The Court: Q. What did he say that he would do?

A. He said he would recommend to the board of directors, and felt positive they would follow his recommendations.

Mr. Aldwell: Q. Recommend what, Mr. Pierson?

The Court: That is what I am trying to get at.

A. The amount of money that would be paid. It would be on the basis of the salary we should have received, in comparison with what other steamship lines were paying.

The Court: Q. Is that what he said?

A. Make up the difference, correct.

Mr. Aldwell: Q. Did he say he would recommend it on that basis?

A. Yes, sir." (Tr. 84-85)

Appellee also testified that there was no discussion about what persons would receive the bonus other than the reference to "key men" (Tr. 86-87). On cross-examination, appellee admitted that Mr. Suewer had informed him that he had no authority to grant such a bonus but that he (Mr. Suewer) was confident that the directors would accept his recommendation. Appellee said that he was confident, too (Tr. 83-84).

We contend that such testimony does not warrant the finding that Mr. Suewer said that his recommendation would be based upon the reasonable value of appellee's services during the period of warfare and that finding No. 4 is to that extent "clearly erroneous."

In examining the evidence, we point out that Mr. Suewer's testimony is in the record by deposition. This court is in as good a position as the trial court to judge the credibility of his testimony. The same is true of part of appellee's testimony.

Mr. Suewer's testimony is straightforward and convincing and is corroborated by the circumstances. We refer particularly to the discussion of Mr. Suewer's authority. It is not disputed that he informed appellee that he did not have the authority to authorize the additional sum contemplated and could only make a recommendation to the directors. If all that was contemplated was to pay appellee the reasonable value of his services it is quite evident that no such denial of authority would have been made or believed. Mr. Suewer did have authority to grant pay increases. He had done so in the preceding year when he increased appellee's salary from $600 to $708.33 a month. He did so again in 1945 when he increased appellee's salary from $708.33 to $750 per month. But on the other hand, if the bonus discussed was of the nature testified to by Mr. Suewer, namely, the recommendation of some additional sum as a reward to faithful employees, the denial of authority to act is understandable. Such a payment would be over and above normal compensation for service. We respectfully suggest that both parties to the conversation understood at the time that the bonus under discussion was of this nature.

But even if appellee's version of the conversation were to be accepted, it would not support the finding.

Appellee first testified that there was no discussion of the amount to be recommended other than

> "what would be considered a fair bonus for the top men that had carried on through the war period at a low salary" (Tr. 210).

That account is substantially in accord with Mr. Suewer's testimony. At the trial, appellee revised his testimony as to what

Mr. Suewer had said and testified that Mr. Suewer had told him that the recommendation would be based upon salaries being paid for comparable positions in similar steamship companies (Tr. 85). But neither of appellee's versions supports the finding. A recommendation based upon salaries paid by other steamship companies is not equivalent to a recommendation based upon the reasonable value of the individual's services. We think it evident that the reasonable value of appellee's services may have been much more or much less than the salary prevailing in other steamship companies for comparable positions. Accordingly, we respectfully submit that the trial court's finding that Mr. Suewer stated to appellee that the basis upon which he would recommend the bonus would be the reasonable value of appellee's services finds no support in the evidence. The choice permitted by the testimony is between a finding that Mr. Suewer stated no basis for the bonus (as testified by Mr. Suewer and, we think, corroborated by appellee on deposition) or that he stated that the recommendation of a bonus would be based upon salaries prevailing in other steamship companies for comparable services (as testified by appellee at the trial).

III. THE CONVERSATION OF FEBRUARY 1944 DID NOT CREATE A CONTRACT OF EMPLOYMENT

If the trial court's finding of the evidentiary facts is accepted, still we contend that those facts did not give rise to a contract.

The trial court purported to find as a "fact" (Finding No. 5; Tr. 29) that the conversation of February 1944 constituted a contract of hiring from that date to the termination of the war. We respectfully submit that this deduction by the trial court is a conclusion of law drawn from the evidentiary facts and that the trial court's own action demonstrates that this is so.

It will be recalled that the trial court originally ordered judgment for appellant, saying that there was no evidence of contractual liability (Tr. 16). Findings of fact and conclusions of

law were adopted pursuant to that order and judgment was entered for appellant. The evidentiary facts originally found (what was said in the conversation of February 1944) were substantially identical with those subsequently adopted (Tr. 18). The trial judge simply changed his mind about the legal consequences of those facts. This is made clear in the order vacating the original judgment (Tr. 25):

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services. § 1611 California Civil Code."

We think that the correct rule is that in determining the existence of a contract the question of what was said and done is a question of fact. But whether those facts constitute a contract or not is a question of law (100 A.L.R. 969). But it is unnecessary to argue the question. If the existence of a contract under the present circumstances is not purely a question of law, at least it is one of those questions of mixed law and fact in which the answer is found by inferences and conclusions drawn from the evidentiary facts. The findings on such matters are not entitled to the weight generally given to a finding of fact for the appellate court is in as good a position to draw the inference as the trial court and is free to substitute its judgment.[8]

We invite this Court to review the evidence and, accepting the trial court's finding of the evidentiary facts, to exercise the same freedom about drawing the inference of contract or no-contract as the trial court itself did when it vacated the judgment for appellant and entered one for appellee.

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8. See cases cited supra at p. 16.

A. The Contract Found by the Trial Court Is Inconsistent With the Finding of Evidentiary Facts.

The trial court's Finding No. 5 that the conversation of February 1944 created a contract of employment from that date to the end of the war is inconsistent with the finding of what was actually said in that conversation. In Finding No. 4 the trial court found that Mr. Suewer had stated that he

> "would recommend to the Board of Directors that such additional sum of money or bonus be paid * * *."

But to say, as the trial court did, that the conversation *itself* constituted a contract of hiring at the reasonable value of appellee's services is to make a nullity out of the express promise to "recommend." There would be no need to recommend anything, the duty to pay would have arisen already.

Such a construction is equivalent to finding that the promise was "to pay" rather than "to recommend." It is plain that the testimony will not bear such an interpretation as to what was said, and the trial court did not even suggest in its findings that there was a promise *to pay* as distinguished from a promise *to recommend.* The finding of a contract necessarily assumes that a promise to *recommend payment* of the reasonable value of the services is, in legal effect, a promise that the amount will be paid. The conclusion does violence to the ordinary meaning of words.

B. There Was No Intent to Contract.

Both parties to the conversation testified that Mr. Suewer had informed appellee that he had no authority to grant the additional sum which was being discussed. Whether Mr. Suewer was correct in his conclusion about his authority is entirely immaterial. When a man states that he does not have authority to enter into a contract, we do not understand how an intent to contract can be imputed to him. Neither do we understand

how the other party, having been advised of the lack of authority, could possibly consider that he was entering into a contract. To find, as the trial court did, that a contract was entered into in the course of a conversation in which both parties assumed that there was no authority to make the contract, disregards the fundamental basis of contract law—that a contract is a matter of mutual intent.

IV. THERE IS NO BASIS IN THE EVIDENCE FOR THE FINDING THAT THE CONTRACT OF EMPLOYMENT INVOLVED A RETROACTIVE ADJUSTMENT IN PAY.

If the conversation of February 1944 constituted a contract of employment from that date to the end of the war (as the trial court found in Finding No. 5), there is no basis for the further finding that the compensation agreed upon was to be the reasonable value of appellee's services, *not during the term of the contract, but from December 7, 1941 to the termination of the war.*

On its face that would be an extraordinary agreement. Appellee's theory about what happened in the February 1944 conversation does not support the inference that the parties agreed upon any such consideration. The transaction which appellee sought to persuade the Court to believe had occurred was that appellee, being underpaid, had threatened to resign and that Mr. Suewer, in order to retain his services, had entered into a contract with him to pay additional money. If the court accepts that version of the facts, it might be reasonable to assume that Mr. Suewer would have agreed to pay appellee enough to retain his services, but that would have been done by an agreement to pay the reasonable value of his services from that date forward. It seems to us most unlikely that an employer, faced with an employee who demanded a salary equal to what competitors were offering, would not only agree to meet such competitive

salaries but also would agree to reopen the question of salary for more than two years past and pay an additional sum for that period too.

We think that such an agreement is so improbable that it cannot be sustained without definite testimony to support it. Yet the evidence which we have been able to discover in the Record with respect to this matter consists of nothing more than a few vague remarks about compensation for the "war period" (Tr. 68, 84-85, 210). We do not believe that these general remarks are any basis for finding that an agreement for future hiring involved a promise to pay the reasonable value of appellee's services for more than two years past.

The finding of a retroactive adjustment also is inconsistent with the reasoning upon which the trial court deduced the existence of a contract.

In the order vacating the judgment for appellant, the trial court explained the action taken by stating that:

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. *This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services.* § 1611 California Civil Code." (Tr. 25).

The statute cited by the trial court provides:

> "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, *the consideration must be so much money as the object of the contract is reasonably worth.*"

That reasoning would support a conclusion or inference that the compensation *during the term of the contract* was to be the

reasonable value of the services performed. But the contract found by the trial court was one in which the consideration for the services to be performed during the term of the contract was *more than the reasonable value of those services.* It was the reasonable value of the services to be performed *plus* an adjustment of past services. Plainly, such an agreement cannot be inferred from the premise that a hiring at an undetermined amount is equivalent to a hiring for the reasonable value of the services to be performed.

For these reasons, we respectfully submit that even if the trial court's finding of a contract of employment is upheld and even if the Court agrees that it was an implied or express term of such contract that the compensation should be the reasonable value of the services, the only possible interpretation is that the agreement was for the reasonable value of services to be performed *during the term of the contract,* namely, from February 1944 to August 14, 1945.

V. THE TRIAL COURT ERRED IN FINDING THE REASONABLE VALUE OF APPELLEE'S SERVICES

The trial court found that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 amounted to $44,250 (Finding No. 7; Tr. 29-30). That sum is a computation, arrived at pursuant to stipulation of counsel, of what the total would be if the reasonable value was $1,000 per month throughout the entire period (Tr. 140).[9] We contend that this finding is "clearly erroneous."

Preliminary to a review of the evidence, we point out that the question of what constitutes "reasonable compensation" is one of those questions of ultimate fact which involves in a large measure the conclusions and inferences of the trial court drawn

9. The discrepancy between the amount stipulated to (Tr. 140) and the amount appearing in the findings is accounted for by correction of an error in computing the amount which was corrected after the trial.

from evidentiary facts. Accordingly, the appellate court remains free to draw its own conclusion about the reasonable value of services. *Kuhn v. Princess Lida of Thurn & Taxis* (3 Cir. 1941) 119 F.2d 704, 705-706.[10]

The undisputed evidence shows that in 1942 there was a substantial lull in appellant's business activity during that interval between disruption of appellant's normal operations by the outbreak of war and commencement of operations for the War Shipping Administration (Tr. 41, 164-165). The testimony about the increased duties and responsibilities of appellee related solely to the period of operations for War Shipping Administration, and these did not commence until early 1943.

The testimony about the reasonable value of appellee's services was given by a Mr. Parkinson and by appellee himself.

Mr. Parkinson, *after restating appellee's duties and responsibilities during the peak of war shipping business,* testified that the minimum salary for *such duties and responsibilities* should be $12,000 a year (Tr. 95). That testimony certainly does not support a finding of $1,000 a month during the entire period. At least, by inference, it indicates a substantially lower figure for a period such as the year 1942.

Appellee himself testified flatly that in his opinion the reasonable value of his services amounted to a minimum of $1,000 per month for each and every month of the war period (Tr. 140). It is evident that the Trial Court accepted appellee's testimony in toto. We respectfully submit that that finding is clearly erroneous. As applied to the earlier portion of the period involved, it is in conflict with necessary inferences from Mr. Parkinson's testimony. It also is contradicted by the undisputed physical facts of a substantial lull in activity during that period.

We think, too, that it is contradicted by the inferences which must be drawn from the undisputed evidence with respect to

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10. See discussion and cases at page 16, supra.

prior dealings between the parties regarding wages. It will be recalled that appellee was employed on July 1, 1940 at $600 per month. He admitted that that was more money than he had been receiving before (Tr. 205). From July 1, 1940 until 1943, appellee remained at the same salary. Indeed, it was not until 1943 that he even brought up the subject of an increase (Tr. 179).

Certainly, there was nothing to have hindered appellee from going elsewhere, if he was being underpaid. That he did not do so seems to us to be the strongest sort of evidence that the worth of his services in that period did not materially exceed the $600 per month which he was being paid. Is it conceivable that on December 7, 1941 the reasonable value of his services jumped from $600 to $1,000 per month? We think not, and particularly in view of the undisputed fact that the outbreak of the war brought with it a substantial lull in appellant's business activity, which could only lessen the value of appellee's services in this period.

In the face of all these circumstances, we respectfully submit that the trial court's finding, which is supported only by the spoken words of appellee himself, must be rejected as clearly erroneous.

VI. THE DEFENSE OF ILLEGALITY

The trial court found (Finding No. 5; Tr. 29) that under the terms of the contract of employment the additional amount was payable *within a reasonable time after termination of actual combat warfare* and that such actual combat warfare terminated August 14, 1945. At the same time the trial court found that the agreement was that the additional compensation was payable only *after the termination of wage and salary controls* (Finding No. 11; Tr. 31).

The two findings are inconsistent, and we submit that Finding No. 5 is the only one permissible under the evidence and that Finding No. 11 is "clearly erroneous."

The trial court also purported to find as a "fact" that such payment was not prohibited by the Stabilization Act of 1942 and the regulations issued thereunder.

That is quite plainly a question of statutory interpretation and so is a matter of law rather than of fact. We challenge the interpretation of the statute.

A. The Contract, if One Was Made, Was for Payment at an Ascertainable Future Date Irrespective of the Termination of Wage Controls.

We find not the slightest indication in the Record that the time for payment of any amount which might be due under the contract found by the trial court was set with reference to the termination of wage and salary controls. If there was a contract it was a contract to pay additional compensation for the period of hiring which terminated with the end of actual combat warfare on August 14, 1945. The time for payment which must be inferred from such a contract would be a date within a reasonable time after performance. Accordingly, the trial court's Finding No. 5 that the time agreed for payment was to be a reasonable time after termination of actual combat warfare finds support in the inferences to be drawn from a contract in such form. We find nothing in the evidence to indicate that the parties had any contrary intent. It seems evident that payment was to be delayed only because of the necessity of first communicating with the home office in Manila (Tr. 166).

In this connection we turn to the allegations of appellee's verified complaint. He there alleged that Mr. Suewer had promised to pay the bonus "within a reasonable time of the termination of such actual warfare" (Tr. 3-4) and alleged else-

where that the actual warfare referred to terminated August 14, 1945 (Tr. 3, 4-5). Nothing in that allegation suggests that the time for payment was arrived at with reference to the termination of wage controls.

Neither do we find anything in appellee's testimony to suggest that the date for payment was agreed upon with reference to termination of wage controls.

Accordingly, we think that Finding No. 5 in which the trial court found, in accordance with the allegations of the complaint, that the additional compensation was payable "within a reasonable time after the termination of the war" (Tr. 29) is the only finding which could be sustained by the evidence.

Termination of the war plainly is not equivalent to the termination of wage controls. It is a matter of common knowledge that a large number of the wartime economic controls continued for a substantial period beyond the war and in fact still continue. The coincidence that in this case actual combat terminated on August 14, 1945 and that wage controls were partially lifted on August 18, 1945 does not alter the fact that the time for payment was set in complete disregard of the existence or non-existence of wage controls.

B. A Contract to Pay an Additional Sum at the Termination of Actual Combat Warfare Is Illegal and Void.

We discuss in this section the legal status of a contract to pay an additional sum at the end of actual warfare, irrespective of the existence or non-existence of wage and salary controls. This was the contract found in Finding No. 5, and as we have shown in the preceding section, it is the only permissible interpretation of the evidence.

It is not disputed that this agreement to pay additional compensation fell within the application of the Stabilization Act of 1942 (Act of October 2, 1942, Chapter 578, 56 Stat. 765; 50

U.S.C. App. Sections 961 et seq.) and the regulations issued thereunder. Relevant portions of that statute provide:

> "Section 965. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act."
>
> "Section 970. When used in this Act the terms 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services * * *."

Pursuant to that Act and to Executive Order 9250, the regulations were issued requiring approval by the Secretary of the Treasury for any increase in the salary paid to an individual earning more than $5,000 a year (29 C.F.R., Part 1002.10). No such approval was sought or obtained for the increase involved in this case.

Actual combat warfare ended August 14, 1945. The additional sum was therefore due within a reasonable time from that date. By Executive Order No. 9599, wage and salary controls, effective August 18, 1945, were released to an extent which would have permitted payment.

Had the payment been due *on* August 14, while wage controls were still in force, we think there could be no question that the contract would be illegal and unenforceable. It has been so held in numerous cases[11] and we do not understand appellee to contend otherwise.

But if the finding that payment was due within a reasonable time after August 14, 1945 means a date subsequent to August 18, 1945, the situation is one where, due to a modification of the regulations, the payment would be lawful at the time for performance. We submit that such a contract is equally void.

The great weight of authority holds that a bargain for an

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11. See *Wernhardt v. Koenig* (E.D. Pa. 1945) 60 F.Supp. 709; *Del Re v. Frumkes* (Supreme Court, 1948) 81 N.Y.S.2d 97.

illegal act is itself illegal and that a subsequent change in the law permitting such an act does not breathe life into a void contract. 6 *Williston on Contracts* (Rev. ed.) Sec. 1758; *Rest. of Contracts,* Sec. 609; *Fitzsimons v. Eagle Brewing Co.* (3 Cir. 1939) 107 F.2d 712, 126 A.L.R. 681; Note 126 A.L.R. 685; *Palmisano v. United States Brewing Co.* (10 Cir. 1942) 131 F.2d 272.

The contract in question, if it was made at all, was one made and to be performed in California. The California statutes and cases require adherence to this principle.

California Civil Code, Sec. 1667, declares:

> "That is not lawful which is:
>
> 1. Contrary to an express provision of law;
> 2. Contrary to the policy of express law, though not expressly prohibited * * *."

California Civil Code, Sec. 1550, declares:

> "It is essential to the *existence* of a contract that there should be:
>
> * * * * * * *
>
> 3. A lawful object."

A contract to pay an additional sum at an ascertainable future date, made at a time while salary controls are in effect, is one having an unlawful object and is void from its inception.

The California cases have uniformly held that a contract to do an act prohibited by statute, whether *malum in se* or *malum prohibitum,* is illegal and void. *Smith v. Bach,* 183 Cal. 259, 191 Pac. 14. Such a bargain being void from its inception, cannot draw life from the subsequent repeal of the prohibitory law. *Willcox v. Edwards,* 162 Cal. 455, 461, 123 Pac. 276.

With respect to the statute and contract involved in this case, we submit that *In re Pringle Engineering & Mfg. Co.* (7 Cir. 1947) 164 F.2d 299, is controlling. There a contract was made to pay a salary and a bonus consisting of a percentage of sales.

Approval was sought from the Salary Stabilization Unit and was granted with respect to the salary but deferred with respect to the bonus with instructions to renew the application when the time for payment arrived. Prior to the time for payment of the bonus, controls were lifted. The Court denied the claim for a bonus, saying at p. 301:

> "the bonus plan not being in effect while the Stabilization Act controlled salaries, it could not rise phoenix-like out of the ashes of the revocation of the salary clause, because it is a general rule that the terms of a contract must be determined by the law in effect when the contract is made. Hannay v. Eve, 3 Cranch 242, 2 L.Ed. 427; Steffey, Inc. v. Bridges, 140 Md. 429, 117 A. 887. The proposed bonus, moreover, was in derogation of the spirit as well as the purpose of the Act, namely, 'In order to aid in the effective prosecution of the war, the President is authorized * * * to issue a general order stabilizing prices, wages, and salaries * * *.' 50 U.S.C.A. Appendix, § 961. Any bonus agreement between the parties then was illegal, and the referee properly held the agreement not binding on the bankrupt."

We also point out that the rationale of the decision, if not the precise holding, in *Kells v. Boutross* (Supreme Court, 1945) 53 N.Y.S.2d 734, is in accord with this rule.

These cases, we think, establish that the only contract which can be inferred from the evidence is illegal and void.

C. An Agreement to Pay an Additional Sum After Termination of Salary Controls Is Unenforceable.

If this Court were to accept the inconsistent and unsupported finding that the agreement was to pay the additional sum *after termination of salary controls,* a novel and important problem in the law of illegality would be presented.

The question is whether parties can lawfully contract that after termination of salary controls an additional sum shall be

paid *for services rendered during the period of salary controls.*

We have found no cases in point and can only argue the matter on principle. The absence of authority is a strong indication that such bargains were not thought lawful, for it takes little imagination to foresee widespread use of such a device to evade the salary stabilization laws, if such contracts were thought valid.

The answer depends upon whether such a contract violates the purposes and policies of Congress expressed in the Stabilization Act of 1942. We think that it does.

The policy and purposes of the law are pretty much a matter of judicial knowledge and they are summarized in the President's Message to Congress on Inflation, September 7, 1942 (H. Doc. 834; 88 Cong. Rec. 7283).

The control of wages was important largely to make possible control of the price of goods. But if such contracts were valid, the real cost of production would increase just as much as though the higher wages were paid in cash concurrently with the services. The inflationary pressure would continue for an employer would have to set aside a reserve out of current income to meet the accumulation of additional pay to become due in the future.

It was a part of the scheme of wage and salary controls to prevent competition for labor and services from disrupting the normal economic life of the country. It was important that employers in non-essential industries not be allowed to hire employees away from essential industries by offering higher wages. But such a scheme as this would simply have shifted the zone of competition to promises of bonuses after termination of controls and so would have frustrated the purpose.

It was part of the Congressional purpose to prevent accumulation of large excess purchasing power in a period of restricted supply of goods. But if this contract is valid, then so would be

a contract by which the additional sum was represented by a promissory note payable after termination of wage controls. Such a note would be available as security or could be sold and result in the very evil against which the law was directed. Even without issuing a note, the contract to pay would be available as security for loans. And even without utilizing the contract to raise cash, it would have somewhat the same effect in that the employee could freely spend the full amount of his current cash receipts, secure in the knowledge that he would collect a substantial sum after the war.

Congress was not solely concerned with inflation during the war. The problems of post-war readjustment were a matter of Congressional concern throughout the war. The disastrous effects of releasing a pent-up flood of back pay are readily imaginable. As a practical matter it would simply have made impossible the removal of wage controls for many years after the war and thus have forced continuation of the thoroughly disliked economic controls long beyond Congressional intent.

We think, then, that such a device to evade the law plainly is contrary to the intent and purposes of Congress.

But, we may assume that appellee will contend that the letter of the statute does not condemn such a bargain. We submit that that is not enough to save it.

The fact is that the statute, itself, does not condemn any kind of contract. It simply forbids an act. The contract is illegal and void, not because it is so declared in the statute, but because a bargain to do such an act is one having an unlawful object and therefore lacks an essential element of a contract. Cal. Civil Code Sec. 1550(3).

The statute establishes a policy and the Court refuses to enforce a bargain repugnant to the policy. But the public policy established by the statute may be broader than the express language of the statute. Thus it is provided in Cal. Civil Code Sec. 1667:

"That is not lawful which is:

1. Contrary to an express provision of law;
2. Contrary to the *policy* of express law, *though not expressly prohibited;*"

The California courts construing this section have declared that in determining the validity of a bargain, the policy and purposes of the law must be looked to and that a bargain designed to evade the policy of the law will not be enforced. 6 Cal. Jur. p. 104, and cases cited.

We urge that the Court, if it accepts this interpretation of the bargain, declare such an attempted evasion of the law to be contrary to the policy of the statute and unenforceable.

CONCLUSION

We have argued a number of independent reasons and grounds for reversal of the judgment. It is pointless to extend this brief by summarizing them here. If this Court accepts any one of the several points made, the judgment must be reversed.

December 2, 1948.

Respectfully submitted,

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